

**BEFORE THE DIRECTOR OF THE
DEPARTMENT OF PESTICIDE REGULATION
STATE OF CALIFORNIA**

In the Matter of the Decision of
the Agricultural Commissioner of
the County of Placer
(County File No. 059-ACP-PLA-07/08)

Administrative Docket No. 159

DECISION

Steven Clendenning, Owner
Clendenning Enterprises Landscape & Electric
8289 Crossoak Way
Orangevale, California 95662

Appellant /

Procedural Background

Under Food and Agricultural Code (FAC) section 12999.5 and California Code of Regulations (CCR), title 3, section 6130, county agricultural commissioners (CACs) may levy a civil penalty up to \$5,000 for certain violations of California's pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing on May 2, 2008, the Placer CAC found that on February 1, 2008, the appellant, Steven Clendenning, operated a landscaping business that included the application of a pesticide. The business, Clendenning Enterprises Landscape & Electric, was not licensed to operate as a pest control business nor was Mr. Clendenning properly licensed in violation of FAC section 11701. The Placer CAC found five additional violations of the State's pesticide laws and regulations pertaining to 3 CCR sections 6602, 6678, 6724, 6738 and 6726, and levied fines totaling \$900.

Mr. Steven Clendenning appealed from the commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation (DPR). The Director has jurisdiction in the appeal under FAC section 12999.5.

Standard of Review

The Director decides matters of law using her independent judgment. Matters of law include the meaning and requirements of laws and regulations. For other matters, the Director decides the appeal on the record before the Hearing Officer. In reviewing the commissioner's decision, the Director looks to see if there was substantial evidence, contradicted or uncontradicted, before the Hearing Officer to support the Hearing Officer's findings and the commissioner's decision. The Director notes that witnesses sometimes present contradictory testimony and information; however, issues of witness credibility are the province of the Hearing Officer.

The substantial evidence test requires only enough relevant information and inferences from that information to support a conclusion, even though other conclusions might also have been reached. In making the substantial evidence determination, the Director draws all reasonable inferences from the information in the record to support the findings, and reviews the record in the light most favorable to the commissioner's decision. If the Director finds substantial evidence in the record to support the commissioner's decision, the Director affirms the decision.

Factual Background

On February 1, 2008, a Placer CAC inspector conducted a pesticide use monitoring inspection of the application of an herbicide by backpack sprayer at a private residence in Granite Bay, California. The applicator identified himself as an employee of Clendenning Enterprises Landscape & Electric and identified the material being sprayed as Roundup Pro. Neither the backpack nor a 2.5-gallon storage container holding the pesticide was labeled. The employee did not have a copy of the label on site nor was there a copy of emergency medical care information on site. The employee was not wearing protective eyewear or chemical resistant gloves. The owner of the business, Steven Clendenning, was also on site. He told the inspector that he had shown the employee how to apply Roundup but did not document the training. Further investigation revealed that Clendenning Enterprises was not a licensed pest control business and that Mr. Clendenning did not have a qualified applicator certificate.

The CAC cited Clendenning for six violations: FAC 11701, 3 CCR sections 6602, 6678, 6724, 6738 and 6726. A Notice of Proposed Action was issued for the violations and included a proposed fine of \$900.

Relevant Statute and Regulations

Mr. Clendenning stipulated to the violations of 3 CCR sections 6602, 6738 and 6726. Those violations need not be discussed further and the code sections will not be described here.

FAC section 11701 makes it unlawful for a person to advertise, solicit, or operate as a pest control business unless the person has a valid pest control business license issued by DPR.

3 CCR section 6678 requires that service containers shall be labeled with the name and address of the person or firm responsible for the container; the identity of the pesticide in the container; and the word "Danger," "Warning," or "Caution" in accordance with the label on the original container. A service container is defined in FAC section 12757.5 as any container, other than the original labeled container of a registered pesticide provided by the registrant, that is utilized to hold, store, or transport the pesticide or the use-dilution of the pesticide.

3 CCR section 6724 requires the employer to assure that employees who handle pesticides are properly trained in all aspects of handling and applying pesticides, that the employer have a written training program, and, amongst other detailed requirements and as relevant here, to maintain a written record of that training.

When levying fines, the CAC must follow the fine guidelines in 3 CCR section 6130. Under section 6130, violations shall be designated as "Class A," "Class B," and "Class C." A "Class A" violation is one which created an actual health or environmental hazard, is a violation of a lawful order of the CAC issued pursuant to FAC sections 11737, 11737.5, 11896, or 11897, or is a repeat of a Class B violation. The fine range for Class A violations is \$700-\$5,000. A "Class B" violation is one that posed a reasonable possibility of creating a health or environmental effect, or is a repeat of a Class C violation. The fine range for Class B violations is \$250-\$1,000. A "Class C" violation is one that is not defined in either Class A or Class B. The fine range for Class C violations is \$50-\$500.

Appellant's Allegations

The appellant stipulated at hearing that his company violated three regulations: 3 CCR section 6602 by failing to have the pesticide label at the use site; section 6738 by failing to have his employee use the proper chemical resistant gloves and eyewear; and section 6726 by failing to have emergency medical care information available at the use site.

The appeal received from appellant stated only that Mr. Clendenning was appealing based on the fact that this was his first code violation, that he agrees with only 3 of the 6 violations, and feels the total fine is exorbitant and an extreme financial hardship for him and his family. The appeal did not contain specific grounds, facts, or allegations as to why the CAC's decision should be modified, or reversed in whole or in part. However, at the hearing Mr. Clendenning stated that he did not know that he needed to be licensed to apply pesticides and was not aware of pesticide laws. He argued that Roundup Pro is an herbicide and not a pesticide so that the pesticide laws should not apply. Lastly he argued that he should have been warned because there was no way he would know that he must comply with these laws.

The Hearing Officer's Decision

The Hearing Officer (CAC Christine E. Turner) discussed the stipulations entered into by the parties on the violations caused by the failure to have the pesticide label at the use site (3 CCR section 6602) and to wear protective eyewear or chemical resistant gloves (3 CCR section 6738), and found that both violations pose a reasonable possibility of creating a health or environmental effect and are properly class B violations with a minimum fine of \$250. The Hearing Officer felt that because Mr. Clendenning did not have any similar violations over the

previous two years, that levying the fine at the minimum levels was appropriate. The Hearing Officer also discussed the failure to provide emergency medical care information at the use site stipulated to by Mr. Clendenning, but noted that Mr. Clendenning himself was at the site and may have been able to assist in an emergency. The Hearing Officer felt that Mr. Clendenning's presence established that this violation was a Class C violation with a minimum fine of \$50.

Mr. Clendenning testified at hearing that Roundup Pro was not a pesticide, but was a herbicide and that the pesticide laws did not apply. The Hearing Officer relied on the definition of a pesticide found in FAC section 12753, the definition of a pest under FAC section 12754.5, and the wording on the Roundup Pro label to explain to Mr. Clendenning that Roundup Pro is a pesticide. The Hearing Officer also relied on the definition of a service container found in FAC section 12575.5 and testimony of Mr. Clendenning and the Placer CAC Senior Agricultural Inspector Darryl Mitani that demonstrated that the backpack sprayer and the 2.5-gallon blue plastic container filled with Roundup were not labeled to find that a violation of 3 CCR section 6678 occurred. This was found to be a Class B violation subject to a minimum \$250 fine.

The Hearing Officer cited to Mr. Clendenning's statement that he had shown his employee how to spray Roundup but failed to document the training to conclude that a violation of 3 CCR section 6724 occurred, but constituted a Class C violation with a minimum fine of \$50. During the hearing Mr. Clendenning also admitted that he did not have a valid pest control business license. The Hearing Officer thus found that a violation of FAC section 11701 occurred and was a Class C violation with a minimum fine of \$50. The total fine assessed was \$900.

The Director's Analysis

Mr. Clendenning stipulated to three of the violations and those violations will not be discussed further. The Hearing Officer found that the failure to have the label on site (3 CCR section 6602), and the failure to wear protective eyewear and chemical resistant gloves (3 CCR section 6738) were violations that pose a reasonable possibility of creating a health or environmental effect considered to be a Class B violation. These two requirements are very important to protect pesticide handlers and to have information available to assist in providing medical care if necessary. The finding of a Class B violation is reasonable. The Hearing Officer found that the failure to have emergency medical care information available was a Class C violation based on Mr. Clendenning's testimony that he was present at the site and could take his employee to the hospital if needed. The finding is also reasonable and within the CAC's discretion.

The backpack sprayer and the 2.5-gallon container storing Roundup Pro were properly determined to be service containers under FAC section 12757.5, and were required to be labeled pursuant to 3 CCR section 6678. The testimony cited by the Hearing Officer established that the containers were not properly labeled in violation of the regulation. Roundup Pro is a registered

pesticide. The failure to properly label these containers poses a reasonable possibility of creating a health or environmental effect as cited by the Hearing Officer and is properly charged as a Class B violation.

The evidence is uncontradicted that Mr. Clendenning failed to document that he trained his employee to apply Roundup Pro in violation of 3 CCR section 6724, and that Mr. Clendenning did not have a valid pest control business license in violation of FAC section 11701.

As argued by the County, individuals who operate businesses are required to thoroughly investigate all laws, regulations, and requirements relating to the business, and comply with those requirements. Mr. Clendenning admitted that he did not have a business license of any kind to operate in Placer County. As testified to by Mr. Mitani, the Placer CAC conducts outreach to licensed landscaping businesses, and provides education to those businesses about the need to obtain a pest control business license. If Mr. Clendenning had applied to the County for the business license required to conduct his landscaping business, he would have been provided information regarding the use of pesticides and the need for appropriate licenses. Mr. Clendenning complained that he should have been told of these requirements, but failed to comply with other legal requirements that would have led him to discover those at issue here. It is troubling that a business that applies a chemical with toxic effects does not know that the chemical is a pesticide, is without concern for the safety of its employees, and operates without the benefit of the labeling that would advise of measures to take to protect human health, wildlife, and the environment. As of this date, Mr. Clendenning still has not obtained a pest control business license from DPR. The levying of a fine is an appropriate response to ensure compliance to these very important and readily discovered legal requirements.

Conclusion

The commissioner's decision that Mr. Steven Clendenning violated 3 CCR sections 6602, 6678, 6724, 6738, and 6726, and FAC section 11701 is supported by substantial evidence. The commissioner's decision to levy a fine of \$900 is also supported by substantial evidence, and well within her discretion.

Disposition

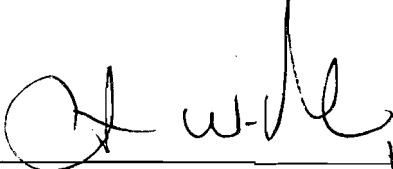
The commissioner's decision is affirmed. The commissioner shall notify the appellant how and when to pay the **\$900** fine.

Judicial Review

Under FAC section 12999.5, the appellant may seek court review of the Director's decision within 30 days of the date of the decision. The appellant must file a petition for writ of mandate with the court and bring the action under Code of Civil Procedure section 1094.5.

**STATE OF CALIFORNIA
DEPARTMENT OF PESTICIDE REGULATION**

Dated: OCT 31 2008

By: 
Mary-Ann Warmerdam, Director